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No. 80-207

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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CBS INC.,

*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## REPLY TO OPPOSITIONS TO PETITION FOR CERTIORARI

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Respondents in their oppositions appear to argue that certiorari should be denied because the court of appeals' decision was correct. We believe that the issues in this case are important and warrant review by this Court and that the decision of the court below is directly at odds with decisions of this Court, pertinent legislative history and the First Amendment.

1. Respondents Federal Communications Commission and the United States (the "Federal respondents") make

the remarkable suggestion that Section 312(a)(7), 47 U.S.C. § 312(a)(7), as interpreted by the Commission, is "fully consistent" with the longstanding policies of the Act.[1] In their view, Section 312(a)(7) "is no more than a limited augmentation of well established statutory pattern of broadcast regulation."[2] This "well established pattern" simply does not exist. As we discuss in greater detail below, neither Section 315 of the Act, 47 U.S.C. § 315, nor any other section heretofore conveyed an affirmative right of access to political candidates or any other speakers. The Commission's pre-existing policy under the public interest standard did not delegate to individual candidates the right to demand access according to their individual needs, but instead allowed the broadcaster considerable latitude in determining when and under what circumstances political time should be sold.[3]

In making their claim, these respondents do not even mention this Court's recent decision in *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979), which, as we pointed out in our petition, is central to this case.[4] In *Midwest Video*, this Court made clear that Commission regulations affording rights of access to individual speakers in the first instance are fundamentally inconsistent with the policies of the Communications Act against treating

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[1] Brief for the Federal Respondents in Opposition ("Fed. Opp.") at 9. At the same time, however, both the Federal respondents and Respondent Carter-Mondale Presidential Committee, Inc. ("CMPC") argue that Section 312(a)(7) was intended to create a new, individual right of access to the broadcast media for federal candidates. Fed. Opp. at 9-10; Brief for Respondent Carter-Mondale Presidential Committee, Inc. in Opposition ("CMPC Opp.") at 5.

[2] Fed. Opp. at 8.

[3] *See* FCC Memorandum on Second Sentence of Section 315(a), reprinted in *Political Broadcasts—Equal Time: Hearings Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce on H.J. Res. 247*, 88th Cong., 1st Sess. 90 (1963).

[4] Petition for Certiorari in No. 80-207 ("Pet.") at 17-18.

broadcasters as common carriers. As this Court stressed in striking down Commission regulations providing for access to cable television systems as contrary to Section 3(h) of the Act, 47 U.S.C. § 153(h), "we are unable to ignore Congress' stern disapproval—evidenced in § 3(h)—of negation of the editorial discretion otherwise enjoyed by broadcasters and cable operators alike." 440 U.S. at 708; *see also id.* at 702-06; *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 103-14 (1973) ("*CBS* v. *DNC*").

2. The history of Section 312(a)(7) shows, moreover, that Congress in enacting Section 312(a)(7) intended no departure from the well-established general policy described in *Midwest Video*. In *CBS* v. *DNC*, this Court recognized that Congress has repeatedly refused to enact proposals designed to grant rights of access to particular individuals and groups. 412 U.S. at 113-14. In support, this Court stated that Section 312(a)(7) merely "codified" the Commission's prior practice, under which a broadcaster retained great discretion in responding to individual candidates' requests to purchase time. *Id.* at 113-14 n.12. Respondent CMPC simply ignores this statement; the Federal respondents dismiss it as "dictum" and, quoting the court of appeals, urge that this Court's view is of little significance because this "Court simply had no need to pass" on the question.[5] As we have discussed in our petition, this Court's findings as to the scope of Section 312(a)(7) were central to its conclusion that the Communications Act reflected a policy of not granting rights of access to individual speakers in the first instance.[6]

Moreover, contrary to the Federal respondents' suggestion[7] this Court's statement as to the meaning of

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[5] Fed. Opp. at 12, *quoting* App. A. at 21a.

[6] Pet. at 17-19.

[7] *See* Fed. Opp. at 12.

Section 312(a)(7) is supported by the Commission's contemporaneous construction of the statute in its brief to this Court in *CBS* v. *DNC*.[8] In addition, the report of the Senate Commerce Committee concerning Section 312(a)(7) makes clear that the obligation reflected in Section 312(a)(7) was already "inherent in the requirement that licensees serve the needs and interests" of the community of license. S. REP. No. 96, 92d Cong., 1st Sess. 34 (1971). The report stressed that the Commission under Section 312(a)(7) should "continue to consider" the extent to which broadcasters had satisfied their obligation under the public interest standard. *Id.* at 28.

Respondents ignore these statements, which provide the most direct congressional explanation of the purpose of Section 312(a)(7), and instead point again to a statement in the Senate report that one purpose of the Federal Election Campaign Act of 1971 was to provide "greater access" to the media for political candidates. *See* S. REP. No. 96, *supra*, at 20 . However, the quoted passage makes no reference whatever to Section 312(a)(7). It refers to other sections of the bill, such as a provision repealing Section 315 for Presidential and Vice Presidential campaigns, a section that was not even enacted.[9]

Indeed, the predominant purpose of the statute as a whole was not to increase the scope of political campaigns, but to shorten them and reduce what were viewed as excessive expenditures on media advertising.[10] The judgments that the broadcasters made in the present case were not only consistent with those Congressional policies but also were designed to ensure that all simi-

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[8] *See* Pet. at 19 & n.30.

[9] S. REP. No. 96, *supra*, at 21. The Report also referred to the "lowest unit charge" provisions now codified in Section 315(b), 47 U.S.C. § 315(b), and parallel provisions (never enacted into law) for non-broadcast media. *See id.*

[10] *See* S. REP. No. 96, *supra*, at 22-28; 117 CONG. REC. 28,813 (1971) (remarks of Sen. Prouty).

larly situated federal candidates received even-handed treatment in accordance with the broad policies of Section 315, rather than treatment based upon their own "individual needs." [11]

3. Respondents also minimize the important questions of the constitutionality of government-imposed systems of access to the broadcast media—questions that this Court in *Midwest Video*, *supra*, 440 U.S. at 709 n.19, recognized as substantial.

The Federal respondents point to Section 315 of the Act, which requires that broadcasters grant "equal opportunities" to candidates for public office, as establishing a constitutionally permissible "tradition" in favor of

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[11] Respondents now place great reliance on the supposed "plain language" of Section 312(a)(7). *See* Fed. Opp. at 10; CMPC Opp. at 4. In its initial decision, however, the Commission stated that the language of the statute provided little direction. 74 F.C.C.2d at 637, App. B at 78-80a. In any event, that language is equally consistent with an interpretation that all Congress intended to do in enacting Section 312(a)(7) was to provide the remedy of license revocation for "willful or repeated" failure to observe the existing public interest requirements.

Respondents also urge that a 1971 amendment to the second sentence of Section 315(a) somehow shows that Section 312(a)(7) was not "meant merely to codify pre-existing obligations". Fed. Opp. at 11 n.7; *see* CMPC Opp. at 5-6. In fact, the purpose of the amendment to Section 315(a)—which was adopted at the same time as Section 312(a)(7)—merely made clear that no obligation to sell time to candidates in the first instance was created "under this subsection [315(a)]," thus in effect reiterating the original language of the section which had stated that no obligation to sell time in the first instance had been created "hereby." *See* 48 Stat. 1064, 1088 (1934). While respondents urge that this clarification shows that Congress intended to create new affirmative rights of access under Section 312(a)(7), the amendment to Section 315(a) is equally consistent with the view that Congress in Section 312(a)(7) was merely codifying the policies concerning the sale of time to candidates that previously existed under the public interest standard. Moreover, the amendment to Section 315(a) confirms that Congress viewed affirmative access and contingent access to be quite different, and that Section 315(a) had nothing to do with affirmative access.

granting access in political matters, and suggest that Section 312(a)(7) is consistent with that policy.[12] In fact, Section 312(a)(7), as construed by the court of appeals, and Section 315 operate in radically different fashions. As construed, Section 312(a)(7) grants a right of access to an individual candidate, whether or not a broadcaster has made an initial decision to present the views of opposing candidates. Section 315, however, like the reply requirements of fairness doctrine sustained in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), comes into play only when a broadcaster has made an initial decision to broadcast a particular program. Section 312(a)(7), in the language of the court of appeals, creates an "affirmative" right of access, while Section 315 creates only a limited "contingent" right of access.[13] Although respondents seek to minimize these differences between rights of reply and initial rights of access, in the past they have been viewed as constitutionally significant.[14] This Court has never sustained an affirmative right of access imposed upon broadcasters.

Respondents also attempt to minimize the constitutional issues by contending that the "Commission's decision here involves no government review or abridgement of editorial discretion."[15] To the contrary, the decision, as with any system of access, in fact restricts the broadcaster's editorial judgment, a judgment that is important here in order to allow the broadcaster to balance the sale of time to political candidates with the broadcaster's

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[12] Fed. Opp. at 13-15.

[13] See App. A at 14a.

[14] In *CBS* v. *DNC*, this Court stressed that an affirmative right of access raised substantially greater dangers of intrusion than the "contingent" right accorded by the Commission's fairness doctrine. 412 U.S. at 126-27; *see also Midwest Video, supra*, 440 U.S. at 705 n.14.

[15] Fed. Opp. at 9.

own journalistic coverage and other programming. By making the needs of the individual candidate the determinative criterion and by permitting comprehensive Commission review of broadcaster judgments, the decision to a substantial degree divests the broadcaster of discretion to determine amount of time sold and the conditions under which those sales will be made and locates that power in the candidate and Commission.[16]

Finally, the Federal respondents suggest that the right of access established by the Commission's interpretation of Section 312(a)(7) is more limited than the one at issue in *CBS* v. *DNC* because it applies only to federal candidates.[17] The fact that only one class of speakers may command access to the media does not mitigate the inherent intrusive impact on broadcaster judgment. In contrast to *CBS* v. *DNC*, 412 U.S. at 131, there was nothing in *Midwest Video* suggesting that the Commission could permissibly adopt any kind of access system, even a "less intrusive" one. *See* 440 U.S. at 705 n.14. Under any access system, the governmental intrusion—

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[16] The Federal respondents' view to the contrary is apparently based on their suggestion that "[u]nlike a more open-ended general access scheme, Section 312(a)(7) leaves little room for disputes over, and resulting governmental oversight of, such initial issues as which speakers have access rights, which speakers are entitled to responsive time, and how time is to be made available." Fed. Opp. at 15. This case, of course, involves a dispute as to "how much time is to be made available," and turned on some rather refined distinctions. While the Commission in effect held that the offer of a half-hour was required, *see* 74 F.C.C.2d at 644, App. B at 90a-91a, *id.* at 674, App. C at 138-39a, the court suggested that an offer of 15 minutes might have been defensible, App. A at 37a, and CBS itself had originally offered the Carter Committee a total of ten minutes. *See* Pet. at 5. Commission decisions under Section 312(a)(7) since the decision in this case indicate that issues of "how much time is to be made available" will continue to arise with considerable frequency. *See, e.g., Ed Clark for President Comm.* (Broadcast Bur., Sept. 23, 1980); *Ed Noble For Senate Comm.* (Broadcast Bur., Aug. 20, 1980).

[17] Fed. Opp. at 15-16.

involving the necessity of determining "who should be heard and when" (*CBS* v. *DNC*, 412 U.S. at 127)—and the attendant dangers remain the same. Moreover, to favor one group of speakers—federal candidates—by granting preferential access rights may itself be constitutionally prohibited.[18]

4. The issues presented by this case are of profound practical importance to broadcasters, political candidates, and the public. The interpretation of Section 312(a)(7) adopted by the Commission, which requires a broadcaster, upon receiving a request from a candidate for federal office, to "tailor [its] response to the *individual* candidate," [19] has inevitably led to an increasing number of complaints to the Commission by candidates alleging failure on the part of the broadcasters to afford them "reasonable access." Indeed, as the Federal respondents admit, since the Commission's decision in this case, the Commission or its staff have issued eight decisions involving Section 312(a)(7).[20] Thus, contrary to the Federal respondents' assertions,[21] the effect of the decision below has been increasingly to draw the Commission into a "continuing case-by-case determination of who should be heard and when." *CBS* v. *DNC*, 412 U.S. at 127. Moreover, as Judge Tamm pointed out in his separate opinion, this continuing Commission review occurs in a highly sensitive political area where the fact or appear-

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[18] In *CBS* v. *DNC*, this Court rejected a contention by the Democratic National Committee that the Court should at least recognize a right of national parties to purchase time. This Court stated: "We see no principled means under the First Amendment of favoring access of organized political parties over other groups and individuals." 412 U.S. at 127 n.21.

[19] App. A at 39a-40a (emphasis in original).

[20] Fed. Opp. at 16 n.15. The Commission continues to issue such rulings. *See Ed Clark for President Comm.* (Broadcast Bur., Sept. 23, 1980).

[21] *See* Fed. Opp. at 16.

ance of Commission favoritism is a substantial constitutional danger:

> "We cannot ignore the fact that members of the Federal Communications Commission may have more than a passing interest in the outcome of Federal elections, particularly presidential contests. . . . Even if a Commissioner makes every effort to remain impeccable neutral, it is nonetheless possible, especially in presidential campaigns, that his partisan and political affiliations might subconsciously influence his decisionmaking." [22]

## CONCLUSION

For the reasons stated above and in our petition for certiorari, the writ should be granted.

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[22] App. at 63a-64a.